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Robert L. Rabin

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# Some Reflections on the Process of Tort Reform

ROBERT L. RABIN\*

In May 1985, the American Bar Association (ABA) invited a group of just over a hundred practitioners and academics to participate in a program in Lexington, Kentucky, ambitiously entitled "The Tort Liability System: Does It Serve the Public Interest?" Although the immediate purpose of the meeting was to discuss a recently published, five year study of tort law commissioned by the ABA,<sup>1</sup> the accident compensation system was under attack on a number of fronts. In the immediately preceding months, product manufacturers, physicians and municipalities had joined in a chorus of resentment and bewilderment over steeply rising insurance costs, and liability insurers, in turn, had proclaimed that a tort crisis was upon us.<sup>2</sup>

As a panelist in Lexington, addressing areas of current concern, I took as my theme the growing disjuncture between the underpinnings of liability and damages in common law tort actions. Drawing on examples from professional malpractice, products litigation and

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\* A. Calder Mackay Professor of Law, Stanford Law School. Visiting Professor of Law, 1987-88, Harvard Law School. B.S. 1960, J.D. 1963, Ph.D. 1967, Northwestern University. As the essay indicates, my experience as Reporter for the American Bar Association Action Commission to Improve the Tort Liability System stimulated me to think critically about the issues discussed in this essay. I would like to express my appreciation for financial support from the Stanford Legal Research Fund, made possible by a bequest by Ira S. Lillick and by gifts from other friends of the Stanford Law School. I also benefited greatly from workshop presentations at Harvard Law School and Northwestern University Law School, as well as discussions in a tort reform seminar I offered, spring semester, 1987, at Stanford. Bruce L. Hay provided valuable research assistance.

1. SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984) (report to the American Bar Association).

2. See *Sorry, Your Policy is Cancelled*, TIME, Mar. 24, 1986, at 16; *infra* notes 17-18.

municipal liability, I argued that tort damage awards continued to be grounded in a commitment to individualized, subjectively determined harm, at the same time that case-by-case determinations of liability appeared to be strongly influenced by a norm of enterprise-based socialization of risk. The resulting anomaly, I asserted, was the failure to recognize the trade-offs traditionally associated with enterprise or activity-based risk pooling — particularly, limitation of compensable harm to economic loss.<sup>3</sup>

In traditional academic fashion, I went no further than spelling out the “tension” in the system as I saw it. Indeed, I was not even so bold as to carry the argument to an outright assertion that legislative intervention was essential, or some similar heresy. Essentially, I argued no more than that the judiciary needed to demonstrate greater self-awareness in tort cases. My sense of urgent concern, uncoupled from the menace of radical proposals, appeared to strike a responsive chord in many of the participants.

The proof came some four months later when the sponsors of the program contacted me to inquire about my willingness to serve as reporter to a commission the ABA was in the process of forming, the Action Commission to Improve the Tort Liability System (Commission). I was initially hesitant, in part because I had no ideological agenda to promote. After some thought, however, I decided that the experience was likely to be worthwhile precisely because it was so far-removed from my usual academic endeavors. And so, over the course of a little more than a year, from November, 1985 to January, 1987, I was to be immersed in a singularly non-academic exercise: attempting to draft a set of proposals for improving the tort system that satisfied an exceedingly diverse group of commissioners and stood a chance of adoption by the ABA itself.<sup>4</sup>

The purpose of this essay is not to re-tread the ground covered by the Commission. Rather, I have in mind to sketch out some of the reflections on law reform and the tort system that were a by-product of that exercise in pragmatism — but, at the same time, were sufficiently removed in intellectual space from the reporter’s role to deserve separate treatment. More specifically, I initially will examine the historical antecedents to the present tort reform movement, and then discuss the goals that tort reform might be taken to serve, the

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3. Both workers’ compensation and automobile no-fault plans feature this characteristic: in return for “universal” coverage, compensation is limited to economic loss.

4. The membership of the Commission included representatives of the federal and state judiciary, plaintiffs’ and defense bar, insurance industry and academic world, and civil rights and public interest practitioners. For a brief description of the Commission’s methodology, see REPORT OF THE ABA ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM ix-xi (Preface) (1987) [hereinafter COMMISSION REPORT]. The substantive work of the Commission is found in the body of the report and recommendations.

data on system performance, and the strategies for addressing some of the perceived malfunctions.

## I. THE LESSONS OF HISTORY

The literature of tort reform is notably ahistorical. Perusing the multitude of commission reports, magazine articles and newspaper accounts devoted to the "crisis" in tort law, one might well conclude that there was once a Golden Age of Tort, still clearly identifiable not so long ago, known as the Negligence Era.<sup>5</sup> It was a period in which the principle of liability based on fault provided a sound moral and economic basis for deciding unintentional accident cases. For nearly two centuries, the fault principle reigned supreme. The horse and buggy may have been replaced by the ubiquitous automobile, cottage industry may have lost out in the competitive struggle to the mass producers of a vast array of consumer products, and the family doctor may have given way to the high-powered specialist, capable of identifying and treating a far wider array of ailments. But until relatively recently, the literature would suggest, accident law — through the due care formula — provided a serviceable system for compensating unintentional harm.<sup>6</sup> Whatever changes modernity had wrought, the foundations of the system remained intact: the two-party structure of tort litigation, the relative ease of determining causation, and the intrinsic fairness of the fault principle.

As any serious student of tort law knows, this image of a universally acclaimed fault principle, done in by runaway juries and the siren song of enterprise liability, is a considerable distortion of the historical picture. Deep-seated dissatisfaction with accident law dates back at least to the rise of the railroad as an engine of destruction, and peaked again as a consequence of the second revolution in mass transport — the centrality of the ever-present automobile.<sup>7</sup>

But what can be learned from these earlier experiences? Do the chronicles of past tort reform movements help to delineate the char-

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5. Virtually all of the tort crisis literature rests on the assumption — often implicit, but sometimes fairly explicit — that accident law functioned in a generally satisfactory fashion until very recently under the comprehensive guidance of the fault principle. For a representative account, see REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 30 (1986) (federal inter-agency study sponsored by the Attorney General) [hereinafter DOJ REPORT].

6. One qualification would be the occasional acknowledgement of the medical malpractice crisis of the mid-1970s.

7. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 682-84 (2d ed. 1985).

acter of more recent developments? Are the prospects for achieving change in the system clarified by examining earlier efforts to overhaul tort law? The would-be tort reformer is hardly in a position to set his or her sights ambitiously (comprehensive reform) or modestly (incremental reform) without reflection on these questions.

The evolution of the workers' compensation movement is, in a sense, a familiar story.<sup>8</sup> The period following the Civil War marks the beginning of rapid demographic change and industrial growth in this country. The railroads spread throughout the land and new industries were founded at an unprecedented pace. A labor force harnessed to the machinery of industrial growth was soon found to be seriously at risk. In the last quarter of the nineteenth century, workplace injuries became a common feature of the landscape of manufacture and transport. As a consequence, a persistent and rising number of claims for redress were brought before the courts.

Characteristically, the initial judicial response was quite conservative. The courts denied many claims, relying heavily upon a trinity of defenses to the negligence action — contributory negligence, assumed risk, and the fellow servant rule — which created a veritable obstacle-course to recovery for workplace injuries. But the toll of industrial accidents grew ever greater and the claims for relief became still more insistent, and the courts, in classic common law fashion, began to soften their unyielding position. The wall of hostility became riddled with qualifications: some courts adopted a vice-principal exception to the fellow servant rule, some fashioned a safe place restriction on the assumed risk defense, and so on. Qualifications built on exceptions, and soon the law of industrial injury was characterized as much by ambiguity and uncertainty as by harshness. In this milieu, not only did the tide of claims continue to rise, but the attendant administrative costs crested as well.<sup>9</sup>

Shortly after the turn of the century, in reaction to this unsatisfactory state of affairs, the workers' compensation movement swept the country. Between 1910 and 1921, forty-two states passed industrial injury legislation, replacing tort law with an administrative system affording compensation for accidental injuries arising on the job.<sup>10</sup>

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8. See, e.g., Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

9. See W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 21-23 (1936). One thorough study from the era concluded that "for every \$100 paid out by employers for protection against liability to their injured workers, less than \$37 is paid to those workmen." NEW YORK EMPLOYERS' LIABILITY COMM'N, FIRST REPORT, I, 31 (1910), quoted in W. DODD, *supra*, at 22. Even the amount recovered by the employee would be reduced — often by a third or more — by attorney fees. See *id.* Moreover, the burden on the court system was substantial; it was estimated that the New York state courts devoted one-fifth of their time to industrial accident claims. See *id.* at 23.

10. *Id.* at 27-28.

Such is the story of workers' compensation narrowly told: a pioneering effort to replace tort law with a no-fault compensation scheme. In fact, however, there is a more embracing version of the workplace injury story that identifies workers' compensation as one strand in a broader pattern of legislative activity associated with the Progressive Era. Without attending to this story, the present day significance of the historical record is obscured.

To begin with, a wide-ranging commitment to workplace reform was a central tenet of Progressivism.<sup>11</sup> At the height of the movement, there was a flood of child labor and women's rights legislation aimed at regulating the maximum hours and workplace conditions afforded to groups perceived to be particularly vulnerable. Similarly, detailed regulatory limitations were enacted in a wide variety of occupations in which special health and safety concerns existed — from miners to cigar makers.<sup>12</sup> Indeed, health and safety concerns occupied a central position on the Progressive agenda entirely apart from the employment nexus; witness the enactment, in quick succession, of landmark congressional regulation in the area of food and drugs, as well as meat inspection legislation.<sup>13</sup>

Workers' compensation represented a convergence of these two core Progressive concerns: it addressed a perceived inequity in the treatment of laborers, and, at the same time, responded to the concern about health and safety conditions. In addition, the industrial injury problem was precisely the kind of issue that evoked the bedrock Progressive ideal of faith in expertise.<sup>14</sup> Work-related injuries, as a societal concern, were regarded as highly amenable to rational administrative treatment through preventive measures; specifically, the application of expert systems analysis to the production function. And, at the same time, administrative competence was considered the touchstone to revised strategies of reparation for injury victims, such as rehabilitative measures that were outside the remedial structure of the courts.

Viewed in this broader context, in which the states became laboratories for Progressive experimentation in social welfare, the impulse

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11. See A. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA 1910-1917* at 59 (1963 ed.).

12. One such scheme, regulating the maximum number of hours per week that a baker might work, led to the landmark substantive due process case, *Lochner v. New York*, 198 U.S. 45 (1905).

13. See generally Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189 (1986).

14. See generally P. NONET, *ADMINISTRATIVE JUSTICE* (1969).

to engage in fundamental change — outright abolition of the tort remedy, and, concomitantly, rejection of the commitment to liability based on fault — becomes more understandable. If criticism of the treatment of injured workers had been grounded exclusively in concerns about inefficiencies in judicial administration and inconsistencies in doctrinal treatment, reform initiatives most likely would have been responsive in kind — unification of doctrine, reassessment of the allocation of power between judge and jury, and similar incremental strategies. But in the context of a far broader re-evaluation of the meaning of freedom of contract in the employment relation, and a corresponding reassessment of the state's police power obligations in the sphere of public health and safety, there was no reason to treat a somewhat arcane judicial commitment to fault liability as an incontrovertible first principle.

I decided to serve as Reporter to the ABA Commission without reflecting on the general lessons that history might offer the would-be reformer, or to the particular learning that might be gleaned from the workers' compensation movement. Somewhat more prosaic considerations were decisive.<sup>15</sup> But I was cognizant of the modest scope of the venture. Beyond the highly diverse composition of the Commission — a prescription for compromise in itself — the many constituencies and critics of the tort system were not clamoring for wholesale change reminiscent of the Progressive Era.<sup>16</sup> As we shall see, even the most strident tort critics called for tinkering with the machinery — limitations on the level of awards, the incentives to litigate, and/or the structure of payments, rather than the creation of a new system of compensation.

Had I thought about it, I might well have concluded that incremental change was almost certainly the only realistic prospect in the context of the mid-1980s. If the workers' compensation movement is at all suggestive, it intimates that the fundamental structure of rights to reparation and responsibilities for harm is likely to be altered only when tort reform rides on the coattails of a more powerful ideological impulse.

The Progressives advocated a vision of social welfare that was a sharp departure from the past: a wide range of initiatives to protect health and safety in the workforce were to override the sanctity of freedom of contract. Workers' compensation was one aspect of that

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15. In particular, my feeling was that it would be a valuable experience to be exposed to a group of tort observers with front-line experience and to be involved in the process of articulating workable proposals for change.

16. On this score, consider the distinctly incremental nature of state legislative reforms enacted in 1985-86, catalogued in U.S. DEP'T OF JUSTICE, TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 65-73 (1987) [hereinafter CRISIS UPDATE], and the proposals offered by the Tort Policy Working Group itself. DOJ REPORT, *supra* note 5, at 60-75.

compelling political ideal. By contrast, no similarly powerful engine of change fueled the tort reform movement of the mid-1980s. Although one could discern a generally "conservative" mood in the country, there was no organized political effort at either the national or state level to constrict the array of benefits and protections available to the victims of serious injury and disease.<sup>17</sup>

The tort reform movement of the mid-1980s was far more insular in character. Like the medical malpractice crisis a decade earlier, the reform movement was in large part an uproar over the availability and affordability of liability insurance.<sup>18</sup> To the protests against skyrocketing premiums can be added the related evidence of a rising number of million dollar verdicts, a growing perception of enormous litigation expenses, and a gnawing concern that award levels might careen out of control in the future.<sup>19</sup> All of these considerations, however, are sharply focused on the details of the tort system itself. The movement for reform had shallow roots — a sure prescription, I am suggesting, for incremental rather than comprehensive change.

The automobile no-fault movement of the early 1970s can similarly be offered in support of the thesis that mid-1980s reform was destined to be of the cosmetic rather than the systemic variety. A caveat is necessary at the outset, however. The distinction between incremental and comprehensive reform — somewhat arbitrary at best — blurs in the motor vehicle context. A few states enacted fairly comprehensive no-fault legislation, featuring relatively high dollar thresholds below which tort suits were abolished, while others adopted so-called "add-on" statutes which left the tort system intact.<sup>20</sup> Nonetheless, if the reform impulse was less sweeping than

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17. To the contrary, Congress was debating legislation that would address the needs of elderly victims of catastrophic loss. Still, one can argue that the jaundiced view of consumer, health and safety regulation commonly associated with the Reagan Administration corresponded in a rough sense to the incremental tort reform initiatives of the mid-1980s. On Reagan's regulatory policies during his first term in office, see G. EADS & M. FIX, *RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA* (1984).

18. On insurance premium increases as the cause of the malpractice crisis of 1974-75, see P. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 97-114 (1985). The insurance theme was prominent in the tort liability debate ten years later. See, e.g., *Insurance Shock*, TIME, Sept. 16, 1985, at 55; *As Liability-Insurance Squeeze Hits Everyone*, U.S. NEWS & WORLD REP., Oct. 7, 1985, at 56; *A World Without Insurance?*, FORBES, July 15, 1985, at 40; *Insurance Woes Spur Many States to Amend Laws on Liability Suits*, N.Y. TIMES, Mar. 31, 1986, at A1, col. 2.

19. See, e.g., *Liability Nightmare*, NAT'L REV., Aug. 23, 1985, at 15; *The Tort Explosion*, THE NEW REPUBLIC, Nov. 18, 1985, at 4; *Unsettling Awards in Product Liability*, FORTUNE, June 25, 1984.

20. For a description, see U.S. DEP'T OF TRANS., *COMPENSATING AUTO ACCIDENT VICTIMS* (1985).



that energizing the workers' compensation movement, it still was characterized by political discourse which once again focused on first principles. Between 1970 and 1975, twenty-four states enacted no-fault legislation, against the backdrop of a number of influential studies casting doubt on the fundamental fairness of the tort system as a mechanism for compensating injury victims.<sup>21</sup>

What generated this second impulse to remove injury claims from the courts, substituting — in part, at least — a no-fault system of reparation for traditional tort liability? In my view, three converging themes can be identified. First, rising costs were undoubtedly a factor. Steady increases in automobile insurance premiums had triggered public discontent with the tort system.<sup>22</sup> Commentators advocating no-fault, however, did not rely on a sudden increase in automobile insurance costs, nor did they base their arguments on premium costs per se. Instead, they pointed to the waste and unfairness generated by the fault system, in which litigation costs accounted for large fractions of premiums while many deserving victims went uncompensated.<sup>23</sup>

A second, and rather singular, theme was the campaign launched by two academics, Robert Keeton and Jeffrey O'Connell, to adopt no-fault legislation. Beginning in 1965, with the publication of their influential book, "Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance,"<sup>24</sup> the names Keeton and O'Connell became synonymous with no-fault motor vehicle reform. Venturing outside the ivory tower, the authors engaged in a wide variety of promotional activities on behalf of their blueprint for reform: lobbying, lecturing, and publicizing the need for fundamental change in the treatment of automobile accident victims.

Yet, without gainsaying their efforts, it would be exceedingly naive to believe that twenty-four states enacted reform measures — some quite dramatic in scope — largely in response to the persuasive powers of two academics. Moreover, the five year time-lag between the Keeton-O'Connell plan and the onset of legislative action, as well as the major departures from their blueprint in the wide array of enacted plans, once again suggest that other considerations were at

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21. See M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 705-21 (4th ed. 1987).

22. See, e.g., NEW YORK DEP'T OF INSURANCE, *REPORT TO GOVERNOR NELSON A. ROCKEFELLER, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT?* 40-44 & n.77 (1970).

23. See, e.g., Hart, *National No-Fault Auto Insurance: The People Need It Now*, 21 CATH. U.L. REV. 259 (1972); Jones, *No-Fault: The Road to Reform*, 21 CATH. U.L. REV. 338 (1972); Williams, *Will No-Fault Cost More or Less?*, 21 CATH. U.L. REV. 405 (1972).

24. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965).

work.

Indeed, to focus the issue most sharply, one might ask why there was no legislative assault on the negligence system in the half century preceding 1970, despite the fact that at least as early as 1932 the much-publicized Columbia Research Council Report<sup>25</sup> indicated that the injury toll from the automobile was just as serious, and the inequities in patterns of reparation were probably more striking, than had been true of industrial injury cases at the turn of the century. And one similarly might ask why there was suddenly a wave of no-fault legislation within the brief span of five years — and none thereafter, it might be noted — without either any identifiable interest group activity, in traditional political science terms, or the onset of a discernible crisis that might have sounded the alarm of public concern.

These questions necessitate the introduction of a third factor, outside the ambit of the tort system. Just as workers' compensation can be fully understood only in the context of Progressive aspirations, it is my view that a fully satisfactory explanation of automobile no-fault requires attentiveness to the consumer-environmental movement which began to crystallize in the late 1960s (the "Public Interest Era"), and reached a crescendo of political activity at precisely the same time as the automobile no-fault movement.<sup>26</sup>

Like Progressive legislation, the major federal regulatory enactments of the early 1970s reflected an abiding concern for health and safety. And a principal target of that concern was the automobile. As early as 1966, Ralph Nader's campaign for automobile safety resulted in the establishment of the National Highway Traffic Safety Administration, an initial foray into the regulation of the car makers.<sup>27</sup> Nearly contemporaneously, stringent standards for motor vehicle pollutants were adopted in the Clean Air Act.<sup>28</sup> But neither these landmark regulatory schemes nor the many public demonstrations of antipathy towards the unwanted consequences of the Auto Age offered anything to the everyday victims of traffic accidents.

What every study from the time of the Columbia Report had indicated was the inverse relationship between serious harm to the accident victim and the proportion of economic loss recovered, and, per-

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25. COMM. TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUM. UNIV. COUNCIL FOR RESEARCH IN THE SOC. SCIENCES (1932).

26. I refer to the period as the "Public Interest Era" in an earlier article. See Rabin, *supra* note 13, at 1278-1315.

27. *Id.* at 1283.

28. *Id.* at 1288-91.

haps most strikingly, the number of serious injury victims who received nothing at all from the system.<sup>29</sup> Now, at the height of public concern about the harmful side-effects of automobile use, the time appeared to be ripe for action on a number of fronts, despite the notable lack of traditional organized interest groups representing victims of automobile pollution or accidents.

To the extent that Public Interest Era consumer, environmental and safety concerns created a salutary set of circumstances for the enactment of no-fault legislation — and I am arguing only that it was one important factor, along with others — there is a feature common to the milieu in which automobile no-fault and workers' compensation legislation were enacted. In both instances, a serious challenge to the foundations of the tort system was mounted only when a more comprehensive ideology of victims' rights achieved center stage.

Again, the contrast to the mid-1980s seems substantial. However limited its thrust, automobile no-fault, like workers' compensation, anticipated a critical bargain. The central characteristic of a no-fault scheme is that every victim who satisfies the "nexus" requirement (an injury arising out of driving, employment, or whatever) is entitled to recover benefits without the necessity of adjudicating the responsibility of another party. The trade-off for assured compensation is the denial of individualized benefits as defined by the tort system, particularly, loss through pain and suffering. The fundamental departure in the mid-1980s (and the preceding medical malpractice mini-crisis) is precisely the absence of any such set of trade-offs. In this insular reform movement, rising costs of the tort system become not only a necessary condition of change — cost pressure, as noted, was a catalyst in earlier times as well — but the driving force, the sufficient impulse for action. As a consequence, with no guiding conception of social welfare, the reforms of the 1980s became, in essence, victim take-away programs. The salient question became how benefit levels could be reduced via ceilings on noneconomic loss, disincentives to sue, elimination of parties defendant, denial of collateral source recoveries, and so forth, thereby diminishing the eco-

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29. See U.S. DEP'T OF TRANS., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES (1971). Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207, 212-13 (1971) notes that (1) the ratio of tort benefits paid to economic losses suffered was slightly better than 1:1 for victims suffering losses under \$1000, but was less than 1:10 for victims suffering losses of \$10,000 or more (Table 2) and (2) eight percent of the victims suffering losses of \$10,000 or more received no compensation at all (Table 1).

In my view, these data — raised to a new level of public concern in the late 1960s — account for a far less visible reform movement that quietly swept the nation at virtually the same moment as the automobile no-fault phenomenon, namely, the state-by-state replacement of contributory negligence with comparative negligence.

conomic burden on a heterogeneous group of injury-producing activities.

## II. THE UNEASY CASE FOR "CRISIS"

With the benefit of hindsight, then, the mid-1980s was an unpromising time for tort reform on the grand scale. But suppose the circumstances had been more auspicious — that a recurrence of concern for accident victims was in the air. How would one begin to decide whether the tort system was functioning effectively? And with regard to "effectiveness," what alternative systems of compensation and regulation might provide useful criteria for assessment, or offer competing models of institutional design? Even these questions, in fact, side-step the most fundamental issue: what principles of justice would a satisfying system promote?

At some point, probing too deeply into the proper conditions for reform activity is a prescription for paralysis. Let the would-be tort reformer beware of both superficiality and excessive profundity. Nonetheless, there is an emerging body of data on the performance of the tort system that is helpful in getting beyond purely abstract thinking about the need for reform and appropriate strategies of implementation. Whether this empirical perspective, linked to a closer look at the structure and functions of tort law, illuminates the road to reform activity is the subject next considered.

Suppose that rising costs of liability insurance have been the immediate spur to tort reform in the states. It by no means follows inexorably that the tort system has been malfunctioning. To reach that conclusion, one must rather heroically ignore three fundamental issues. First, there is a question of the functions tort law ought to serve. Without specifying the goals that the system is supposed to be promoting it is impossible to determine whether the system is failing. Second, even if there is a consensus on appropriate goals, any respectable evaluation must be based on empirical data that indicate whether the goals are being met. Sole reliance on doctrinal analysis, however imaginative, cannot begin to tell us how the system is working. And finally, if the data indicate that the system is inefficacious, there must be reason to believe that another mix of institutional mechanisms will do a better job. The question is always the *status quo* as compared to the proposed alternative system.

Clearly, these issues do not all bear the same weight. If the tort system is in serious disrepair, a strong case can be made for a substantial "leap of faith" to an alternative institutional design on a

trial basis. But first we must have some sense of assurance that the system is malfunctioning. And that threshold requirement suggests the wisdom of proceeding initially with a specification of goals followed by examination of data on system performance.

### Goals

Tort reformers of all persuasions, I suspect, are deeply unsettled by any protracted discussions of the goals of the tort system. In part, this unease simply reflects a surface tension between the philosophical and the activist temperament. But the matter cuts much deeper. In reality, there is a notable lack of consensus among close observers about the proper mix of functions that should be served by the tort system.

In view of the historical development of the law of negligence, this embarrassing state of affairs should come as no surprise. As I have argued elsewhere, the fault principle was never the comprehensive underpinning for tort liability that it so often was proclaimed to be.<sup>30</sup> Industrial injury claims were commonly barred by defenses that bore virtually no relationship to due care — particularly, the defenses of assumed risk and the fellow servant rule — and which owed more to presuppositions about freedom of contract than to concerns about personal blameworthiness. Injuries to entrants on land were recompensed according to property law concepts that, once again, bore only a marginal relationship to a standard of reasonable conduct. Injuries from blasting and other highly dangerous enterprises were decided under superficially anachronistic reliance on strict liability rules, which actually came to reflect an emerging ideal of enterprise responsibility — an ideal in direct conflict with liability limited to fault. In short, the tort system, even in the heyday of negligence, reflected a wide array of often conflicting principles that bespoke divergent goals; among others, a communitarian obligation of reasonable conduct, a commitment to entrepreneurial growth, respect for freedom of contract, and regard for autonomous use of land.

Scholarly efforts to systematize this patchwork system fared no better. It would involve an unwarranted digression to review the literature comprehensively. Suffice to say that the most influential effort to lend a semblance of coherence to tort law in the Golden Age of Negligence, O.W. Holmes' treatment of the subject in *The Common Law*,<sup>31</sup> is internally contradictory in a fundamental sense. Within the space of a few pages, Holmes energetically champions the negligence principle on the grounds that it establishes foresee-

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30. See Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

31. O.W. HOLMES, *THE COMMON LAW* 94-96, 108-110 (1881).

ability of consequences as the litmus test for tort liability, and, as a result, promotes the principle of individual choice; and then, he proceeds to argue vigorously for an objective test of fault which would ignore the subjective capacity of the individual to exercise due care. Still more troubling is Holmes' insensitivity to the strict liability, enterprise liability, and no-duty themes in the common law of tort.

In the final analysis, Holmes leaves us about where the case law does: with some suggestive guidelines for establishing a dominant principle of liability — foreseeability, objectivity, reasonableness, and such — but no systematic sense of the goals of the system. A century later, torts scholars have found evidence of a theory of deterrence lurking beneath the surface of Holmes' advocacy of the fault principle.<sup>32</sup> And undoubtedly, there was a precautionary theme underlying the tort concept of foreseeability that he championed. But the fully elaborated notion of tort liability as a vehicle for creating appropriate incentives to safety is very much a child of mid-twentieth century case law and the scholarship of Guido Calabresi.<sup>33</sup> In the classical negligence period, the goal of general deterrence was dimly recognized, at best.<sup>34</sup>

In a sense, however, the most striking feature of the early case law and commentary is the relative indifference shown to the compensatory function of tort law. By definition, the fault principle downplays victim reparation, since liability turns on establishing the occurrence of injury-producing carelessness — irrespective of the harm suffered by the plaintiff. The critical point is, precisely, that under the fault system it is the defendant's standard of conduct that establishes a threshold test of whether there will be liability or not; the wrong done to the plaintiff is distinctly a secondary consideration.<sup>35</sup>

If anything, this singular lack of concern for the victim's injury as an end in itself is underscored by the no-duty themes in early tort law; in virtually every instance, these doctrinal elaborations on the

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32. See Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 30-31 (1973).

33. G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970). The fully elaborated theory, it should be added, rejects fault liability as an appropriate standard for achieving optimal accident prevention.

34. Landmark cases of the period, such as *Losee v. Buchanan*, 51 N.Y. 476 (1873), virtually always extoll the fault principle as essential to the growth of industry and the needs of a civilized society. By contrast, Holmes' analysis proceeds largely as if there were no Industrial Revolution, but makes no direct reference to the preventive role of negligence law either.

35. It is critical to note that the institution of liability insurance, which has been such a powerful generative force in the expansion of the compensation principle, was largely undeveloped in the nineteenth century.

negligence system created further bars to recovery by injury victims. Thus, assumed risk, lack of privity, sovereign immunity, and the host of other no-duty appendages of accident law implemented a variety of “policy reasons” for overriding a plaintiff’s claim for compensation.<sup>36</sup>

With the rise of the workers’ compensation movement, the shortcomings of tort law as a system of reparation were emphasized for the first time. One facet of the newly-heralded theory of enterprise liability was the normal character of work-related injuries. Because risk to workers is as much a cost of production as labor and raw materials, there was no evident reason to distinguish between injuries caused by careless conduct and those that “just happen”; in statistical terms, workers are invariably at risk and their injuries ought to be routinely compensated.

The dynamic potential of the theory of enterprise liability was not lost on astute critics of the time. In a classic article, Jeremiah Smith questioned the logic of singling out workers for special treatment:

If the fundamental general principle of the modern common law of torts (that fault is requisite to liability) is intrinsically right or expedient, is there sufficient reason why the legislature should make the workmen’s case an exception to this general principle? On the other hand, if this statutory rule as to workmen is intrinsically just or expedient, is there sufficient reason for refusing to make this statutory rule the test of the right of recovery on the part of persons other than workmen when they suffer hurt without the fault of either party?<sup>37</sup>

It would be another half century, however, before the compensation norm was afforded recognition within the realm of accident law itself.<sup>38</sup> Indeed, at the time Smith wrote, injured consumers still confronted the privity bar to recovering against product manufacturers even when they could establish lack of due care.<sup>39</sup> But the corrosive potential of the theory of enterprise liability inexorably worked its way into the tort system, challenging the courts to elucidate with greater clarity the competing norms underlying the fault principle and its alternatives. It was only a matter of time before the courts responded. In *Escola v. Coca Cola Bottling Company of Fresno*, Justice Traynor in a highly influential concurring opinion anticipated the future course of liability for defective products:

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life

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36. See generally Rabin, *supra* note 30. On the other hand, the early strict liability themes in accident law reflect a contrary impulse.

37. Smith, *Sequel to Workmen’s Compensation Acts*, 27 HARV. L. REV. 235, 251 (1913).

38. See Priest, *The Invention of Enterprise Liability: A Critical History of the Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461, 502-27 (1985).

39. The privity bar was removed in the landmark case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.<sup>40</sup>

In this passage, Traynor encapsulates perfectly, with the greatest economy of words, the deep-seated confusion of goals which has characterized accident law for the succeeding half century. For he has articulated two *distinctive* goals of accident law — indeed, the two principal goals which have dominated late twentieth century tort law: creating a system of incentives to safety that promotes *deterrence*, and creating a system of risk-spreading among injurers that promotes *compensation*. The problem is that the two goals generate pressures, in both the formal doctrinal expression of the law and the law in action (jury behavior), that are in fundamental tension with each other. In simplest terms, the allocative efficiency achieved through either cost-benefit guided strict liability or negligence does not result in full, or even partial, compensation of all injury victims.<sup>41</sup> With no consensus on which goal should dominate, tort reformers (as well as the courts) have responded to perceived needs for change in a totally *ad hoc* fashion.

What happens in the absence of consensus on appropriate goals? In the second half of the twentieth century, the compensation rationale for enterprise liability is pulling simultaneously in three distinct directions: (1) towards no-fault schemes, such as workers' compensation, as a low-cost method of achieving universal reparation; (2) towards strict liability, as a means of extending the reach of compensation while maintaining the principle of individualized recovery; and (3) towards the elimination of no-duty barriers to recovery under the negligence principle. At the same time, the deterrence rationale for enterprise liability shows similar centrifugal tendencies: (1) towards health and safety regulatory schemes, such as the Occupational Safety & Health Act (OSHA) and the Clean Air Act, as a replacement for tort incentives; (2) towards strict liability as a market-driven strategy for creating greater safety incentives within the tort

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40. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

41. The point is obvious in negligence cases, but even under strict liability there is a threshold requirement that an injury victim must establish a "defect" (under some circumstances), the existence of a duty, and so forth.



system; and (3) towards a more robust negligence system as a device for better internalizing the costs of accidents.

In essence, when the conflicting goals of tort law are brought into clearer focus, the stakes become so high — consider, among others, the prospective trade-off of individualized compensation for scheduled partial recovery, the design of new administrative systems of safety regulation, and the adoption of serious restrictions on the role of the jury — that the major players in the system, as well as most would-be reformers, recoil from the daunting task of fashioning strategic priorities in light of explicitly stated norms.

### *The Dilemmas of Data Interpretation*

In the early twentieth century, a great deal of time and effort was expended on documenting the fate of workers' injury claims. State fact-finding commissions issued lengthy reports demonstrating in vivid detail the gaps in coverage and costs of litigation.<sup>42</sup> As I have discussed, these studies established the foundation for a sharply focused critique of the inadequacies of the tort system.<sup>43</sup> Under the emerging conception of enterprise liability, there was no place to distinguish among industrial injury victims on the basis of whether a failure of due care was the precipitating cause of an accident. The reasonable conduct of the employer — let alone the array of legalistic defenses that might be interposed to the claim for redress — was simply irrelevant to the goals of compensation and deterrence which served as the underpinning for the theory of enterprise liability. As a consequence, the data provided strong support for replacing the tort system with a more equitable form of relief.

A similar bridge existed between the pattern of reparations in motor vehicle injury cases and the analysis of the deficiencies in tort treatment of automobile accident victims. Both the accident data and the critique of the system focused on the goal of adequate compensation.<sup>44</sup> In part, the data highlighted a disparity between the formal law of negligence and the law in action: that an inverse relationship existed between out-of-pocket loss suffered by an injury victim and the amount of compensation actually received.<sup>45</sup> But the accident claims statistics also revealed the inherent "lottery" aspect of the fault system — the failure to treat like injuries in a similar fash-

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42. See W. DODD, *supra* note 9, at 18-26.

43. See *supra* notes 9 & 10 and accompanying text.

44. See *supra* note 21 and accompanying text.

45. See *supra* notes 23 & 29 and accompanying text. This relationship is explained, in large part, by the dynamics of the accident claims process. Rational economic bargaining behavior leads insurers to pay off small "nuisance" claims above face value, but to scrutinize large claims much more closely. Correlatively, injury victims are less able to hold out over the long-term in the latter category of cases. See generally H. ROSS, *SETTLED OUT OF COURT* (1980).

ion — which simply could not be reconciled with the principle that an activity ought to bear all of its own costs.<sup>46</sup> With broader-based compensation as the catalyst, the accident data again pointed to an alternative model, no-fault, that would be directly responsive to the critique of the system.

For the would-be reformer of the mid-1980s there was no such straightforward guidance from the data on tort system performance. In fact, the emerging data only served to underscore the lack of consensus about what needed to be done.

To begin with, there was the dramatic saga of the insurance crisis, which, more than any other single factor, captured the attention of tort system observers.<sup>47</sup> Critics of the tort system found a direct indictment of tort law in the spiral of liability insurance rates and contemporaneous reports of high jury awards. But on close examination the claim that the rise in liability insurance rates can be adequately explained by higher tort awards appears to be based largely on anecdotes and conjecture.<sup>48</sup>

On the other side, tort system defenders pointed to the internal dynamics of the insurance industry as their explanation for the sharp hikes in premiums. In particular, they highlighted the intense competition for premium dollars in a period of high interest rates, followed by the general industry alarm over decreasing loss reserves as interest rates fell and investment income leveled off.<sup>49</sup> Like their adversaries, however, they were hard put to supply any convincing evidence on tort claims, award levels and the administrative costs of the system that would have convincingly refuted the charges that tort law was responsible for the insurance crisis.

Penetrating the maze of contentions and counter-charges is nearly impossible. Almost certainly, the careful study of the New York Governor's Commission, "Insuring our Future: Report of the Gover-

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46. The theoretical underpinning for "activity based" liability (automobile compensation plans) is distinct, despite the risk spreading similarities, from the enterprise liability theory supporting workers' compensation.

47. See *supra* note 30.

48. The Working Group, for example, marshals some rather selective evidence of a rise in claims and award levels but makes no serious effort to identify the extent to which rising award levels promoted premium increases apart from the corresponding influence of insurance investment policies. See DOJ REPORT, *supra* note 5, at 16-52. For a critical view of the anecdotal evidence, see Brill & Lyons, *The Not-So-Simple Crisis*, AM. LAW. 1 (May 1986).

49. See, e.g., *Costs and Availability of Liability Insurance: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. 987-92 (1986) (Statement of J. Finch).

nor's Advisory Commission on Liability Insurance," is correct in concluding after a detailed examination of liability insurance and tort claims in New York, that:

the symptoms of the current crisis are the result of the *combined* effects of an unconstrained insurance business cycle and an unchecked surge in the basic cost of discharging the liability obligation. The business cycle subjects insurance coverage capacity and pricing policy to large, sudden swings and discontinuities governed by factors that have more to do with the play of interest rates and securities yields than with the characteristics of the risk insured. The cost surge caused these sudden price adjustments to trend sharply upward over time, making insurance less and less affordable and blurring the distinction between availability and affordability.<sup>50</sup>

In the final analysis, however, the respective contributions of the tort system and insurance investment practices to the premium increases faced by municipalities, product manufacturers, physicians, and others is largely beside the point. At most, the data can assign responsibility more precisely for a steady rise in the levels of claims, costs and awards that by the middle of the decade led many observers of the tort system to become restive. But the crucial questions remain to be asked, let alone answered: how much have the costs of the system risen, and why should that be a matter for concern?

The latter question brings us full circle back to the indispensability of articulating the goals the tort system seeks to promote. But in the first instance, one must leave the impenetrable fog of debate over the insurance crisis and examine the existing evidence — much of which was produced *after* the proclamation of a torts crisis — bearing on whether the growth of costs and claims in tort cases should be a cause for concern.

The most systematic effort to chart the course of the tort system over the last decade has been the work of the Rand Institute for Civil Justice (ICJ). Since 1979, the ICJ has gathered data on a wide range of subjects, such as trends in jury awards, costs of mass tort litigation, and expenditures in particular areas of tort law.<sup>51</sup>

At the end of 1986, the ICJ published its most comprehensive analysis of the system to date, "Costs and Compensation Paid in Tort Litigation."<sup>52</sup> The study addressed a number of the central issues in the debate over the efficacy of the tort system, including both aggregate and trend data on tort claims, award levels, and administrative costs, leaving it to the reader to reach his or her own normative conclusions.

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50. NEW YORK GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE, INSURING OUR FUTURE 88 (1986).

51. The Rand Institute for Civil Justice (ICJ) publishes a monthly newsletter, Civil Justice Roundtable, describing its research activities. The main thrust of its studies in the tort area has been to gather and analyze data on claims, costs and award levels.

52. J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986).

Aside from insurability, perhaps the most publicized aspect of the tort system has been the concern that a claims explosion is occurring. In recent times, many voices have been heard deploring the increasing litigiousness of American society and pointing to the tort system as a prime instance of the disease.<sup>53</sup> But the lament did not go unchallenged. Early in 1986, the National Center for State Courts published widely noted statistics indicating that civil filings in the aggregate actually had declined over the period 1981-84, and tort filing had increased only slightly.<sup>54</sup> At about the same time, Marc Galanter analyzed the figures supporting the claim of a dramatic increase in the number of federal tort filings and concluded that a very substantial part of the increase was due to a *sui generis* phenomenon, the asbestos cases, and a handful of other singular mass tort episodes.<sup>55</sup>

The ICJ findings bolstered the misgivings of those who harbored doubts about a tort claims explosion. The report found that the annual rate of tort filings over the five-year period, 1980-1985, had been about three percent when adjusted for per capita population growth, hardly an eruption in claims.<sup>56</sup> Moreover, a contemporaneous study on the related issue of punitive damage claims supported other current empirical studies indicating that there was no discernible increase in the number of such awards in accidental injury cases.<sup>57</sup>

Data in hand, however, the tort reformer is regrettably in no position to rest easy, for the most telling point is not that critics of the system have overstated the case for a claims explosion. Rather, looking as one must for some benchmark against which to measure an "acceptable" level of increased claims, we are left in the dark by all of the charges and counter-charges.

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53. See, e.g., Bok, *Law and its Discontents: A Critical Look at our Legal System*, 38 THE RECORD 1 (1983). On the tort system in particular, see references *supra* notes 2 & 18.

54. See NATIONAL CENTER FOR STATE COURTS, A PRELIMINARY EXAMINATION OF AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981 AND 1984 (1986).

55. See Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

56. See J. KAKALIK & N. PACE, *supra* note 52, at 10-11.

57. See M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987); S. Daniels & J. Martin, Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards (1987) (a paper delivered at the Law and Society Association Annual Meeting, 1987, reporting on the results of an American Bar Foundation study of punitive damages); Landes & Posner, *New Light on Punitive Damages*, REG. (Sept./Oct. 1986).

And this is the crux of the matter. The overriding problem with the mid-1980s critique of the tort system is that it is totally bereft of guideposts to acceptable performance. How is one to assess whether a three percent annual rise in claims — or, for that matter, a ten percent rise — is excessive or insignificant? In deploring the rise in claims, critics of the tort system have, in effect, implicitly treated whatever base period they have chosen as reflecting the appropriate level of tort activity — an assumption without warrant.

To offer a concrete illustration of the difficulties presented, consider Patricia Danzon's recent analysis of the medical malpractice field.<sup>58</sup> Danzon relates the findings in a 1974 study that was undertaken by the California Medical Association (CMA) to determine the feasibility of a no-fault system for medical injuries. Relying on legal-medical experts, the CMA evaluated a sample of hospital records in California to determine the incidence of medical negligence in treating patients.

Putting the CMA findings together with claims against hospitalization insurers during the corresponding period, Danzon estimates that about one incident in ten of medical negligence identified in the CMA study actually resulted in a claim for compensation. Proceeding on the assumption that the frequency of claims doubled over the next ten years while the incidence of malpractice remained constant, she concludes that even at the outset of the medical malpractice crisis of the mid-1980s, it was still the case that only one incident of negligence in five resulted in a claim.<sup>59</sup>

The implications of the Danzon analysis are clear. Without suggesting a direct parallel between medical malpractice and other areas of tort claims, it is nonetheless evident that free-standing assertions of "too many claims" are unintelligible. We are brought back to the question of tort system goals. If compensation and deterrence are taken to be two principal functions of tort law, the medical malpractice illustration suggests that it is impossible to assess the effectiveness of the system without interpreting the meaning of a claims rise, in addition to acquiring better data on the ratio of injuries to claims.<sup>60</sup>

The same problem of finding an appropriate benchmark confounds analysis of the tort critics' allegations that an unacceptable spiralling in the level of tort awards has occurred. Here, the pattern in the ICJ

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58. See P. DANZON, *supra* note 18.

59. *Id.* at 18-29.

60. In light of those data, one might conclude that another goal — administrative cost reduction — outweighed the value of broader-based compensation and deterrence. But the touchstone to reform in the mid-1980s has been the cavil that there is excessive tort litigation, not that new strategies of claims resolution need to be devised for dealing with the prospect of a reduced gap between the incidence of unreasonable harm and the propensity to claim for redress.

statistics is arguably clearer than in the trend data on claims. Over the period 1981-85, as the Consumer Price Index rose at an average annual rate of seven percent, the average compensation per claim in automobile cases rose at twelve percent and in non-automobile cases at seventeen percent per year.<sup>61</sup> Moreover, ICJ longitudinal studies of jury awards in San Francisco and Cook County, Illinois, indicated that a steep increase in the average awards had occurred between the late 1970s and the mid-1980s — sixty-nine percent and eighty-two percent respectively — due to substantial growth in the size of the largest verdicts.<sup>62</sup>

Still, it is hard to know what to make of this information. Undeniably, as the average cost of tort awards (adjusted for inflation) rises rather steeply, product manufacturers, municipalities, and service providers are likely to confront higher costs of insuring or self-insuring against potential liability. And, failure to anticipate risk invariably leads to unexpected dislocation costs. But perhaps, once again, this is as it should be. If the perceived Golden Age of Negligence was in fact a time when substantial injury costs were externalized onto unwitting victims, or alternatively, if changing societal attitudes towards pain and suffering, in conjunction with inflation in medical expenses, have substantially outstripped the growth rate in the Consumer Price Index, what is the precise grievance over rising tort awards?

But two other possibilities exist. First, it is conceivable that jury decisions in accident cases are simply far more random than they were in the past. Transfixed by visions of the deep pocket and mesmerized by news reports of million dollar verdicts, the runaway jury may be an occasional and unpredictable occurrence. In a world of random unanticipated accident costs, insurance rates would rise precipitously — uncertainty being the bane of the actuary's existence.

The main difficulty with this scenario is that there is no evidence to support it. Although the award levels in accident cases have been rising rapidly, there are no data, to my knowledge, indicating that the annual growth masks a pattern of *idiosyncratic* awards in random cases which would further undermine the already complex task of rating liability insurance risks.<sup>63</sup> In short, it does not follow from a

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61. See J. KAKALIK & N. PACE, *supra* note 52, at 75.

62. See M. PETERSON, *CIVIL JURIES IN THE 1980S* (1987).

63. Almost certainly, however, the notorious recent mass tort cases, particularly those such as the Bendectin cases where the pattern of jury verdicts has been erratic,

sustained annual rise in tort award levels that there is a higher degree of instability in the pattern of settlements and jury verdicts.

A second reason why the spiral in high-side awards might be considered objectionable is, quite simply, because it makes the injury bill borne by a wide variety of enterprises and activities more expensive than the public is willing to tolerate. This view rests on a somewhat unsettling premise; namely, that a major reason why the negligence principle has avoided fundamental challenge over the past century is that it has offered much less than would appear to be the case. No-duty rules, problems of proof, powerful defenses and inhibitions against litigating have operated, in tandem, to fashion an uncharitable fault principle that restrained liability costs within tolerable limits. A more extreme version of this argument would be that the breakdown of inhibitions and obstacles to bringing colorable tort claims, rather than simply leading to a more robust negligence doctrine, has triggered jury impulses to pay lip-service to the fault principle while, in fact, holding enterprises liable whenever the occasion arises.

A considerable dilemma is posed for the reformer whose principal objective is to respond directly to these arguments that the system has become too expensive because of rising tort award levels. The ICJ studies do not break out noneconomic loss as a separate component of the data on tort awards. As a consequence, it is conceivable that a substantial number of the million dollar recoveries involve truly devastating physical injuries that will require lifetime support rather than runaway noneconomic loss awards. Few tort critics are disposed to suggest less than full recovery of past and future medical expenses.<sup>64</sup>

Moreover, the case for targeting large-scale noneconomic loss is itself highly controversial. Tort system proponents rely on an interpersonal fairness argument: why should victims of the most excruciating injuries — full-body, third-degree burn victims, for example — be singled out in a strategy for cutting the overall costs of maintaining the system? This is an objection with a further twist. Clearly, the higher the ceiling — that is, the greater the effort to avoid substantial discrimination against the most grievously injured — the less likely is the reform to have a meaningful impact as a cost-cutting device. Thus, unless the tort reformer is willing to attack large-scale recoveries of noneconomic loss with a vengeance, there is no reason to think that a ceiling is likely to have a substantial impact on the

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constitute a case in point.

64. Of course, the problem of catastrophic economic loss could be addressed by reliance on new forms of first party social insurance. Indeed, one of the major gaps in the data on accident reparation is the absence of information generally on first party insurance sources of reparation in accidental injury cases.

steady rise in average awards.

This circumstance underscores rather sharply the problematic nature of the pure cost-cutter's agenda. There is a serious question whether the system should be designed to achieve a designated equilibrium at considerable sacrifice to the most seriously injured, particularly in light of the no-fault alternative which would at least effect a redistribution of aggregate compensation among classes of injury victims.<sup>65</sup> Ironically, however, mid-1980s reformers, including those most exercised about rising award levels, remained steadfastly opposed to the prospect of no-fault replacement of the tort system.<sup>66</sup>

Until now, I have focused my discussion of the rising costs of the tort system on award levels. But there is another aspect of costs which has received roughly equal billing in the indictment of tort law: the litigation and other administrative expenses of implementing the system. Again, there are data sources that bear directly on the magnitude of the problem.

The ICJ's comprehensive study presents some arresting figures on the administrative costs of determining liability under our tort system. The authors estimate that, in 1985, plaintiffs' legal fees and other expenses constituted approximately thirty to thirty-one percent of total compensation paid to victims.<sup>67</sup> Defendants' fees and expenses amounted to about sixteen percent of total compensation paid in automobile cases and twenty-eight percent in non-automobile cases.<sup>68</sup> In the aggregate, the ICJ study estimated that plaintiffs' net compensation as a percentage of total tort system expenditures came to fifty-two percent in automobile cases and forty-three percent in non-automobile cases.<sup>69</sup> Reduced to a single figure, injury victims were receiving slightly less than half of every dollar expended by the system on accident claims.<sup>70</sup>

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65. Compare the discussion of automobile no-fault ceilings in Blum & Kalven, *Ceiling, Costs and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341.

66. See, e.g., DOJ REPORT, *supra* note 5 and CRISIS UPDATE, *supra* note 16. They also have been notably silent with regard to social insurance strategies for addressing issues of accidental harm. See *supra* note 64.

67. See J. KAKALIK & N. PACE, *supra* note 52, at 40.

68. See *id.* at 45, 51.

69. See *id.* at 70.

70. A recently published overview by Rand analysts argues persuasively that: There is no longer, if there ever was, a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys, and legal dynamics.

- The first is the world of routine personal injury torts, exemplified by auto suits. They occur frequently and usually involve modest injuries and rela-



The trend data indicated that the system steadily has been growing more costly. For a variety of reasons, the authors were unable to estimate the five-year trendline in plaintiffs' costs, but there is certainly no reason to think they have been decreasing.<sup>71</sup> On the defense side, however, the authors were able to gather data they considered reliable. The figures indicate, for the period 1981-85, a growth of six percent per year in automobile claims and fifteen percent per year in non-automobile cases — the latter figure considerably above the seven percent annual increase in the Consumer Price Index.<sup>72</sup>

One can speculate on the reasons for the two most striking administrative cost figures: victim recovery of less than half the total dollars spent on tort suits, and defense costs rising at a rate of fifteen percent annually in non-automobile cases. Most likely, the growing complexity of products, toxics and medical malpractice cases is one highly significant factor.<sup>73</sup> Whatever the case, there is far less reason to suspend normative judgment here than in response to the clamor about rising claims and award levels. It is difficult to imagine anyone arguing that a legitimate goal of tort law is served by persistent growth in administrative costs or by the routine allocation of more than half the system's expenditures to its maintenance.<sup>74</sup>

But a rather paradoxical conclusion emerges from identifying steep administrative costs as the incontrovertible (and perhaps paramount) criticism of the tort system. Let the would-be tort reformer release the cat from the bag. If administrative costs are the key is-

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tively low financial stakes. Settled law and routine procedures lend an air of stability to this world.

- The second is the world of high-stakes personal injury suits, such as product liability, malpractice, and business torts. Here the litigation itself is newer, the law is still evolving, and the stakes per case are larger and increasingly uncertain.

- The third is the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases, and other suits arising from mass exposure to drugs, chemicals, or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases leads many to view them as problematic.

Each of these worlds is characterized by a different litigation growth rate, jury verdict trend, and cost profile. Treating the three types of litigation together—as is done whenever overall statistics for tort litigation are reported—produces a distorted picture of tort litigation that does not accurately reflect the reality of these worlds.

D. HENSLER, M. VAIANA, J. KAKALIK & M. PETERSON, *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 2-3 (1987).

71. Thirty to thirty-one percent of total compensation paid to plaintiffs corresponds roughly to the traditional view that personal injury lawyers take a contingent fee of about one-third.

72. See J. KAKALIK & N. PACE, *supra* note 52, at 75.

73. In particular, this can be attributed to the greater need for nonlegal expertise at every stage of the litigation enterprise.

74. *But cf.* Henderson, *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981).

sue, the most appropriate reform strategy, apart from abandoning the system altogether, may not involve tort law at all — it may call for initiatives designed by proceduralists who come to the task with an entirely different perspective. Before departing from the stage in haste, however, a more careful assessment of reform strategies is in order.

### III. STRATEGIES OF REFORM

Now that the cat is at least partly out of the bag, I will begin this section by confessing to another heresy. It is far from clear that *any* reform strategy based on incremental improvements in the substantive and remedial character of tort law will have a significant impact.

Consider initially the substantive law of tort. The very first recommendation of the Attorney General's Tort Policy Working Group (Working Group), after sixty pages devoted to documenting a tort system out of control, is that the fault principle be retained as the basis for liability.<sup>75</sup> By all accounts, this is an odd opening initiative. Aside from the products liability area, the fault principle in fact continues to reign supreme throughout accident law. Indeed, the most innovative doctrinal developments during the past two decades have been precisely the establishment of a far more robust fault principle, rather than the overthrow of the negligence standard of liability.<sup>76</sup> In one domain after another, the hallmark of recent years has been the enunciation of an unfettered duty of due care.<sup>77</sup>

Perhaps in recognition of this development, the Working Group focused its discussion on the products liability area. But even here, the case for substantive reform is highly suspect. From the outset, there has been unproductive debate over the extent to which the "unreasonably dangerous" requirement in the landmark Second Restatement of Torts, section 402A, created a fault-oriented standard of strict products liability.<sup>78</sup>

In the design defect cases — the *bete noir* of tort critics, including the Working Group — the widely influential holding in *Barker v.*

75. See DOJ REPORT, *supra* note 5, at 61.

76. See Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

77. Such domains include governmental responsibility, land occupiers' obligations, interfamilial relations and professionals' liability. Consider, also, expansion of the duty to protect against negligently inflicted emotional distress.

78. See, e.g., *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); RESTATEMENT (SECOND) OF TORTS § 402A (1977).

*Lull Engineering Co., Inc.*<sup>79</sup> has long been recognized as an exceedingly weak foundation for developing a meaningful distinction between a strict liability standard and the fault principle. In that case, the California Supreme Court's "excessive preventable danger" test for whether a product design is defective sounds on close analysis suspiciously like the negligence calculus.<sup>80</sup> The much-maligned *ex post* test of requisite knowledge of risk spelled out in *Beshada v. Johns-Manville Products Corp.*<sup>81</sup> —namely, a hindsight (time of trial) determination of the knowable risks to users of a product — was, in fact, overturned within two years of the initial decision. In its place, the New Jersey Supreme Court posited an *ex ante* reasonable foreseeability test which, once again, is closely aligned with a due care inquiry.<sup>82</sup>

Product warnings, under generally accepted doctrine, need only be reasonable in character.<sup>83</sup> Indeed, the single area where strict liability for defective products appears to have real meaning — the case of manufacturing defects, in which liability is established solely on the basis that the harm was caused by an atypically dangerous unit of the standard product — is generally acceptable to critics of the tort system such as the Working Group.<sup>84</sup> Thus, although the reaffirmation of the fault principle may not quite be "full of sound and fury," it certainly does not signify very much either.

I cannot hope to survey all of accident law here to demonstrate that doctrinal reform is a barren strategy. But a bit of history may offer a useful perspective, as an exercise in counterpoint. There was a time when substantive law reform did have real significance. When injured consumers were required to establish a contractual bond to a product manufacturer in order to litigate product defects successfully, abolition of the privity doctrine had enormous consequences.<sup>85</sup> When emotional distress was actionable only if linked to a physical injury, the fashioning of an independent duty to protect against intangible harm constituted a breakthrough in victims' rights.<sup>86</sup> As re-

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79. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

80. See Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979). When applicable, the other prong of the *Barker* test — consumer expectations — is similarly unlikely to diverge from a due care standard in design defect, as distinguished from manufacturing defect, cases.

81. 90 N.J. 191, 447 A.2d 539 (1982).

82. *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984).

83. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* 697 (5th ed. 1984) (liability for failure to warn available only if "manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public").

84. See DOJ REPORT, *supra* note 5, at 61-62.

85. Hence the landmark status of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

86. See, e.g., *Battalla v. State of New York*, 10 N.Y.2d 237, 176 N.E.2d 729 (1961).

cently as a decade ago, the substitution of comparative for contributory negligence was a notable achievement.<sup>87</sup>

But the time for substantive reform of tort doctrine has largely passed. A robust fault principle occupies the field of accidental harm.<sup>88</sup> There is no turning back to the harsh world of wholesale exemptions from fault responsibility. Correlatively, there is no persuasive indication of a substantial move "beyond" fault, for reasons that I have just indicated. If modest improvements in the system are to be effected, the would-be reformer must look elsewhere than substantive doctrine.

The tendency in the mid-1980s has been to challenge what can be best characterized as the remedial side of tort law. A cluster of issues, loosely tied to the size of damage awards, has been the main focal point of tort critics, as well as state legislative activity: in particular, pain and suffering, punitive damages, joint-and-several liability, and the collateral source rule.<sup>89</sup> But the full implications of the challenge are rarely, if ever, spelled out.

With the exception of the collateral source rule, dissatisfaction with the remedial character of tort damages appears to be largely an expression of displeasure about inadequate controls on jury discretion. This is evident in the steady drumbeat of complaints about runaway verdicts and jury nullification of the ground rules of negligence law. But tort reformers have not been willing to meet the issue head-on by, for example, proposing that trial judges instruct the jury on a specified, acceptable range of pain and suffering awards that appear warranted in a given case, or, in the case of punitive damages, by proposing a stringent substantive standard.<sup>90</sup> The source of the reformers' diffidence is readily apparent, even if rarely articulated. Tort reformers of every persuasion are even more suspicious of the good sense of trial judges, generally speaking, than they are of juries. Hence, they express deep-seated antipathy to the entire range of reforms targeted at reallocating authority to decide between judge and jury.

For many of those engaged in the tort reform enterprise, the more attractive option has been a set of cutoff rules: caps on awards, a bar

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87. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

88. There are exceptions — areas still in flux — such as negligently caused "pure" economic loss. See Rabin, *Tort Recovery for Negligently Inflicted Economic Loss*, 37 STAN. L. REV. 1513 (1985).

89. See CRISIS UPDATE, *supra* note 16, at 65-73.

90. But see COMMISSION REPORT, *supra* note 4 (recommendations 2, 4 & 5).

to joint and several liability, or the elimination of collateral source recovery. Again the implications are rarely articulated in full. Consider the notion of capping awards. The obvious difficulties are the arbitrary nature of any cap and the earlier-mentioned regressive effect of ceilings on recovery: those most seriously injured bear the full burden of the cost minimizing strategy.

But the objection to ceilings cuts deeper. The greater the “bite” achieved through a cap, the more it is tantamount to a form of scheduled damages, that is, an approach to reparation that identifies the injury victim as the member of a class, rather than as the bearer of subjectively measured harm. Such an approach, categorical treatment of harm, is the hallmark of a wide array of welfare and social insurance programs. Therein lies the anomaly, however. The proponent of caps professes a continuing attachment to a tort system that makes subjective determinations of liability, at extremely high administrative costs (compared to no-fault and social insurance systems). What is the justification for maintaining this apparatus if an identifiable category of injury victims — arguably the category of victims that provides the strongest reason for case-by-case determinations of harm — is relegated to non-subjective treatment?

Conversely, of course, a very high cap — a ceiling approaching a million dollars — substantially maintains the tradition of individualized treatment of injury victims. Perhaps such a cap serves symbolic purposes, and even lends a modestly greater degree of predictability to the system — although projecting the impact of a high ceiling on tort and insurance costs involves a leap of faith beyond the existing data. But there is a disquieting aspect to focusing reform efforts on such a limited category of very high awards. Indeed, it is a peculiarity that triggers a general sense of unease over the continuing discussion of runaway verdicts. For juries do not operate in a power vacuum. Trial and appellate court judges retain the long-standing power of remittitur, as well as the ability to order a new trial. Why the excessive timidity and the exaggerated deference if juries are truly out of control? In the final analysis, the question remains whether caps are responsive to a precisely identified malfunction in the tort system.<sup>91</sup>

The fairness objections to joint and several liability and the collateral source rule are of a different kind. Displeasure with the doctrine of joint and several liability has been especially evident in the area of municipal liability.<sup>92</sup> Consider two scenarios. The first involves a pe-

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91. Greater judicial controls on tort awards would not, of course, reach large settlements, but presumably if “unwarranted” million dollar verdicts were being overturned, “unwarranted” overly large settlements would be discouraged as well.

92. See, e.g., *Liability Insurance Cost is Soaring for Localities*, N.Y. Times, Sept. 30, 1985, at B1, col. 5.

pedestrian run down by an intoxicated insolvent driver who fails to notice a stop sign. In an effort to find a solvent defendant, the injury victim joins the municipality, arguing that its failure to trim a hedge adequately at the scene of the accident exacerbated the drunken driver's inability to heed the stop sign. The jury finds the city five percent and the driver ninety-five percent at fault, but under the doctrine of joint and several liability the municipality is responsible for the entire award of damages. In the second scenario, a municipal operator of a hazardous waste dump is similarly found to be five percent responsible for toxic harm, while the generators and transporters of the waste, who are responsible for the remaining ninety-five percent, are insolvent. Once again, a defendant whose contributory responsibility is slight ends up paying the entire damage award.

Arguably, full compensation for injury victims ought to be the dominant consideration in these situations, as joint and several liability anticipates. Surely, however, a powerful fairness argument can be made for the contrary position: that a defendant's liability ought to correspond roughly to proportionate responsibility for the harm. This is, in essence, the noneconomic fairness rationale for the tort goal of appropriate deterrence. The would-be reformer may well be left in equipoise by these competing considerations. Whatever the case, this remedial reform strategy suffers from much more substantial disabilities. There is not a shred of evidence in the data that the joint and several liability rule contributes in any significant way to the growth in claims, award levels, or administrative costs. Indeed, in two of the major areas of perceived crisis, products liability and medical malpractice, it very rarely comes into play. Moreover, in the municipal roadway maintenance scenario, the problem could be eliminated entirely in a far more direct fashion by adopting compulsory motor vehicle liability insurance with adequate exposure limits.<sup>93</sup>

The conscientious reformer is likely to be left with similar lingering doubts about the efficacy of collateral source rule reform — the last in the package of remedial strategies. From the outset, opponents of the rule have argued that ignoring collateral sources, such as hospitalization insurance and sick pay, in the determination of tort damages results in an unfair windfall, double recovery for an injury victim. The present day response to this claim is that wide-

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93. The compulsory insurance would have to be supplemented by an uninsured motorist fund to be entirely effective. Assuring adequate compensation for personal harm in hazardous waste cases is a far more complicated matter. See generally Rabin, *Environmental Liability and the Tort System*, 24 Hous. L. Rev. 27, 43-52 (1986).

spread subrogation eliminates most prospects for double recovery and also results in proper cost allocation of liability to risky activities.<sup>94</sup> The tort reformer again is left in a state of uncertainty: the efficiency, as well as the ubiquity, of subrogation is not adequately documented, nor are there data on the extent to which collateral sources have become a return on investment to injury victims.<sup>95</sup> Without this information, the impact of the collateral source rule — and the case for its abolition — is difficult to assess. What appears, on the surface, to be either a strong argument for fairness to defendants or elimination of excessive litigation may, in fact, be trivial on both counts.

The fundamental problem with both joint and several and collateral source reform initiatives is that they bear no certain relationship to the overriding tort reform concerns of the mid-1980s. The tort system is increasingly burdened by administrative costs for a wide variety of reasons, ranging from the increasing use of experts to the growing complexity of determining due care and cause-in-fact in certain types of cases. In the context of these problems, collateral source reform or abolition of joint and several liability is simply a side show, far removed from the main event.

The irony is that virtually no effort has been directed towards adopting strategies of incremental reform that might directly address the chorus of complaints about steadily increasing administrative costs of the tort system. The substance of this critique is that the most troublesome aspect of the spiralling costs of the system is not excessive litigation *per se* but too much lawyering — more concretely, the tendency to abuse the torts process through strategic resort to delay and imposition of burdensome costs of trial preparation. The many forms of this abuse include spurious motions practice, excessive deposition taking, unnecessary continuances, frivolous claims and multiple lawyering.<sup>96</sup>

This is not the stuff of breathtaking reform proposals. Few tort critics of any stripe are likely to rally passionately under the banner of a fast track system, sanctions for abuse of discovery, penalties for spurious claims and defenses, and initiatives to early settlement.<sup>97</sup> Indeed, the centrality of these considerations comes as something of

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94. This issue has long been the subject of debate. *See generally* Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966).

95. I use the term "investment" broadly to include the wide array of employment-related fringe benefits.

96. As a novice at tort reform, I took on the position of Reporter to the ABA Commission blissfully ignorant of the case for process-oriented reform. Before long, however, my exposure to experienced judges and litigators provided new meaning to the administrative cost figures that have fueled such extensive concern.

97. These initiatives are the core of the COMMISSION REPORT, *supra* note 4. I do not for a moment suggest that they offer a panacea, however.

an embarrassment for the would-be tort reformer. Taking reform seriously may well involve the unsettling lesson that the tort specialist has very little to contribute to the effort.

#### IV. THE FUTURE OF TORT REFORM

As a reasonably conscientious torts teacher, I dutifully reserve the last week of class for some crystal ball gazing, including a respectful look at New Zealand. As all tort law observers know, New Zealand took the bold step of virtually abolishing tort recovery for accidental harms in 1974, replacing it with a comprehensive no-fault system which provides coverage for all medical expenses, a substantial portion of lost income, and modest scheduled pain and suffering.<sup>98</sup> As in contemplating any prospective reign of terror, the tort loyalist ultimately must face up to the question, "Could it happen here?"

There are any number of theoretical objections to the New Zealand system, but none of them turns out to be conclusive in my view. In a sharply critical commentary, James Henderson has argued that the New Zealand approach lacks universality and fails to achieve the deterrence and fairness goals of the American tort system.<sup>99</sup> But the universality objection — that it is unfair to distinguish between victims of accident and disease — can be lodged as well against *any* selective no-fault plan, including the longstanding workers' compensation and automobile accident schemes. It is an argument that traditionally has had little appeal to those who regard a serious problem of system malfunction as worth addressing, even if the solution lacks the purity of universal coverage.

The deterrence critique fails to take account of the problematic performance of the tort system on this score, and treats the New Zealand system as the final word on allocating the costs of injuries to risk producing activities.<sup>100</sup> In fact, as commentators have long recognized, comprehensive no-fault schemes can be designed to reflect with great precision the risks of injury associated with particular enterprises; it is simply a question of whether the consequent administrative costs make the effort worthwhile.<sup>101</sup>

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98. See generally G. PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* (1979).

99. See Henderson, *supra* note 74.

100. The New Zealand system is funded out of employer contributions, motor vehicle taxes, and general revenues, without any substantial effort at experience rating.

101. See generally Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980).



Finally, the fairness objection to comprehensive no-fault is highly suspect. If, as in Henderson's critique,<sup>102</sup> the standard of fairness is the fault principle, the attack is circular. A no-fault proponent would never argue that the system generates highly individualized determinations of a victim's loss or an injurer's reasonable conduct. The more fundamental question is whether the traditional tort vision of fairness is superior to one that places principal emphasis on establishing threshold levels of compensation and rehabilitation for all injury victims, as well as creating an *ex ante* funding approach to allocational equity.

In the end, then, the questions come down to competing conceptions of fairness and intuitions about feasibility. And there it is normally left — with friend and foe united in concluding that this country is not yet ready for such a dramatic step in the direction of socialized accident insurance.<sup>103</sup> Indeed, I come full circle back to my observation at the end of the historical section of this essay. In my view, comprehensive no-fault will come, if at all, only on the coattails of a broader renaissance of social welfare concerns, mirroring the experience with workers' compensation in the heyday of Progressivism and automobile no-fault in the Public Interest Era.

In the meantime, however, there are a number of interesting variants on the comprehensive no-fault idea. Since his early days as a standard-bearer for automobile no-fault, Jeffrey O'Connell has waged an indefatigable campaign for a variety of focused or, to use his term, "neo-no-fault" schemes.<sup>104</sup> Most recently, he has proposed legislation that would remove from the tort system accident cases in which any named defendant offers prompt payment of an injury victim's net economic loss and reasonable attorney's fee.<sup>105</sup> The victim, in other words, would be obligated to accept any such settlement offer. The plaintiff would have continuing recourse to the tort system only in a case where no such offer was made.<sup>106</sup> Through this mechanism, O'Connell would hope to reduce substantially the amount of costly, protracted litigation over the existence of due care, defects and causation.

Although O'Connell nicely anticipates the many objections to his inventive scheme, he nonetheless may underestimate the thrust of providing such great leverage to defendants. In response to the con-

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102. Henderson, *supra* note 74, at 794-98.

103. In its deliberations, the diverse membership of the Commission reached this conclusion at an early stage.

104. For a recent treatment, see J. O'CONNELL & C. KELLY, *THE BLAME GAME* 128-35 (1986).

105. *Id.* at 130.

106. The current version of O'Connell's proposal offers an alternative plan under which plaintiff would have the option to reject defendant's no-fault offer, with reduced damages available in the tort suit. *See id.* at 135.

cern about unfair advantage, he argues that both plaintiffs and defendants, by and large, would regard the trade-off of an uncertain jackpot for greater economic security as highly worthwhile. But this arguably misses the point.

Consider two cases: a sensitivity training institute that chooses to compensate the economic loss of an occasional participant who suffers a psychotic reaction to the training program; and a manufacturer of cigarette lighters which similarly decides to settle through paying out-of-pocket loss in the infrequent case of a user incinerated by the malfunctioning of its product. Assuming no willful misconduct in either situation, do we regard with equanimity the respective defendants' capacity to limit responsibility to the payment of economic loss in these cases? Or does the occasional psychotic reaction to sensitivity training appear to be a shared risk, underscoring the wisdom of a no-fault, limited liability approach, while the physical disfigurement of the burn victim evokes a stubborn attachment to individualized compensation? Rather than proposing a bright-line principle for such cases, I mean to suggest that the highly diverse character of accident risks may make the conception of "an offer that cannot be refused" almost as incompatible with public sentiments as the New Zealand approach.

More recently, Stephen Sugarman has proposed another variant on the comprehensive no-fault model.<sup>107</sup> Sugarman sides with those who balk at distinguishing between accident and illness. He would provide first-party medical expense and lost income to everyone who is temporarily disabled (six months or less) irrespective of cause, by requiring employer coverage of sick leave and medical expense, whatever the source, and extending state-provided temporary disability coverage.<sup>108</sup> Although those suffering either "serious impairments" or disabilities extending beyond six months would continue to have recourse to the tort system, it seems clear that, political constraints aside, Sugarman would extend his social insurance proposals to those cases as well, virtually eliminating the tort system.<sup>109</sup>

Thus, Sugarman faces up to the somewhat paradoxical challenge posed by tort system defenders who claim that the New Zealand

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107. Sugarman's early version of the proposal and a detailed discussion of his disenchantment with the tort system is found in Sugarman, *Doing Away With Tort Law*, 73 CAL. L. REV. 559 (1985).

108. See Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987).

109. *Id.* at 806 n.23; Sugarman, *supra* note 107, at 659-64.

approach is insufficiently generous in its coverage.<sup>110</sup> He would move beyond no-fault as well as the tort system, and provide social insurance coverage to everyone who suffers disability from injury or disease.

Whether he thereby would win many converts from the torts camp is questionable. To begin with, Sugarman's proposal is likely to appear seriously deficient to those who regard deterrence of injury-causing activity as a principal function of tort law (or any replacement system). Moreover, the politics of implementing his scheme would be so complex and require such substantial legislative activity that most tort critics — who remain incrementalists, in any event, for reasons already discussed — seem highly unlikely to become standard-bearers. Note, on this score, that in order to implement Sugarman's approach in a comprehensive fashion it appears that state legislative activity of nationwide scope would be required, creating new obligations on employers (mandatory sick leave plans and optional health insurance schemes), and state social insurance systems (creating temporary disability insurance plans); in addition to which, Congress would need to act, amending Medicare and the Social Security disability system if long-term disability were to be addressed from the same perspective. The catalyst for all of this activity is difficult to discern.

Are we left, then, for the indefinite future, with our patchwork system of negligence, strict liability and no-fault, jerry-built on the foundations of succeeding edifices of individualism, enterprise liability and social welfare thinking? Perhaps so. My guess is that the process of tort reform will remain fairly consistent with the past. As malfunctions are perceived, they will be addressed in narrowly-focused, incremental terms, barring a broadly conceived social reform movement.

Yet, there is a degree of "play" in the system that is not fully reflected in the preceding discussion. Like political action generally in this country, tort reform often has been born of expediency rather than ideological commitment. Rummaging around in the hidden corners of our accident compensation system, one discovers, among other nonconformities, a compensation plan for nuclear accident victims,<sup>111</sup> a no-fault scheme for lung-damaged coal miners,<sup>112</sup> and another for vaccine-related injuries.<sup>113</sup> These "focused" compensation systems reflect a political impulse that falls somewhere between the social welfare-based conception of the major no-fault plan and the

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110. See Henderson, *supra* note 74, at 792-94.

111. Price Anderson Act, 42 U.S.C. § 2210 (1982 & Supp. III 1986).

112. Black Lung Benefits Act, 30 U.S.C. §§ 901-45 (1982 & Supp. III 1985).

113. National Childhood Vaccine Injury Act of 1986, tit. III, Pub. L. No. 99-660, 100 Stat. 3755 (1986).

constrained logic of incremental tort reform.

There have been many near-misses of this kind in the political arena. In 1980, when Congress passed the Superfund legislation, enacting an extraordinarily elaborate regulatory scheme for cleaning up hazardous waste sites, serious consideration was given to coordinate provisions which would have provided no-fault compensation to related personal injury claimants.<sup>114</sup> Victims of mass exposure to a wide variety of other toxics, such as Agent Orange, asbestos, and the Nevada atom bomb tests, have sought *ex post* compensation for alleged injuries — claims for compensation that faced major obstacles in the tort system.<sup>115</sup> It would be extremely short-sighted to think that we have seen the last of these political initiatives.

Rather, the prospect is that focused no-fault will command continuing attention. Arguably, the most visible embarrassment of the tort system is its structural inadequacy in certain kinds of cases, vividly demonstrated by current toxic tort episodes, such as asbestos, DES, Bendectin, and the Dalkon Shield.<sup>116</sup> These cases involve a staggering number of claims, widely dispersed throughout the judicial system. Despite the enormous number of claims, each mass tort situation features common, if not identical issues of causation, standard of conduct, and damages — issues, in many instances, of great scientific complexity that are ill-suited for determination through the adversary process.

The need for some form of collective determination within or outside the judicial forum, as contrasted to resolution under the classic two-party litigation model, seems transparently clear. Similarly transparent, unfortunately, is the tort reformer's suspect credentials for getting the job done. Once again, it is the proceduralist — the specialist in class action consolidation, multi-district jurisdiction, reconstituted discovery techniques and the like — who ought to be

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114. Instead, the Superfund legislation provided for establishing a study group which subsequently issued a report and proposed no-fault compensation scheme. See *Superfund Section 301(E) Study Group, Injuries and Damages From Hazardous Wastes — Analysis and Improvement of Legal Remedies, A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Senate Comm. on Env't & Pub. Works, Serial No. 12, 97th Cong., 2d Sess. (Sept. 1982).*

115. See generally Rabin, *supra* note 93.

116. See generally Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983). For a contrary view, see Rosenberg, *The Causal Connection Issue in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

providing the necessary expertise as far as judicial reform is concerned.<sup>117</sup>

But toxics reform if it is to come, is not, in my view, the harbinger of a general assault on the tort system — any more than modest, focused no-fault ventures have served as advance guard actions in the past. As long as the tort system functions tolerably well in the kinds of cases it has traditionally handled, New Zealand and its like probably will remain on the drawing boards while tort reformers tinker with the present model. The reformer with bolder designs must await another coming of the spirit of Progressivism.

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117. See, e.g., Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 21-42 (1986) (advocating a range of procedural adaptations to mass tort litigation).